



BOZEMAN CITY-COUNTY PLANNING OFFICE

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Office of the Secretary
Federal Communications Commission
Washington, DC 20554

Dear Secretary:

The following comment is offered in response to the Notice of Proposed Rule Making published on September 12, 1997. [WT Docket No. 97-192; FCC 97-303]

- 1) (I. Definitional Issues, No. 2 & 3) We believe that the Report and Order, ET Docket No. 93-62, 61 FR 41006, August 7, 1996, which declined to consider the preemption of state and local regulations relating to Radio Frequency emissions is correct. We assert that the interpretation which most preserves local regulatory authority is most desirable.
- 2) (I. Definitional Issues, No. 4, 5, & 6) Comment is sought on the definition of "final action" by a state or local governmental entity. The proposed rule would determine that an action was ripe for review after the first adverse decision by a state or local governmental entity and prior to any local appeal. We assert that this is premature and that a "final action" should not become ripe for review so long as an administrative appeal remains available. A "final action" should also not become eligible for review if the applicant has failed to exhaust all available remedies.
- 3) (I. Definitional Issues, No. 5) A request for siting of a wireless service facility would be classified by the City of Bozeman as an Essential Service Type II and would be processed as a Conditional Use Permit. For these types of administrative reviews we are required by state law, Montana Code Annotated §76-2-303, to advertise the public hearing at least 15 days in advance. With the lead time required to submit notices to the newspaper this normally requires a minimum of 20 days after the receipt of a complete application.

As shown on the enclosed information a minimum of eight weeks is required to process the complete application for a preliminary site plan approval. This is a uniform time for all conditional use permit applications. The required time may be longer depending on scheduling of meeting and if a submittal is received immediately after a filing deadline. Zoning variances, when in conjunction with a project such as a Conditional Use Permit, are processed simultaneously with the other application and receive a decision at the same time as the preliminary approval or denial.

One item which is beyond the ability of the City to regulate is the submission of a complete original application. It is uncommon, but a need to suspend processing, or refuse processing of an application does arise from time to time, because the applicant did not provide the basic information needed to evaluate the project. The application forms all have submittal checklists which note, in detail, the information which is required to be submitted in order to

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accomplish a review. Even so, applicants, on occasion, choose to not provide adequate information.

When a preliminary approval, usually with some conditions, has been granted the applicant then prepares and submits a final site plan which demonstrates how all of the conditions have been or will be complied with. The processing of the final site plan generally requires less than 30 days, again depending greatly on the submittal of complete information. When a preliminary approval has been given applicants may also apply for a building permit, which will not be issued until final site plan approval has been obtained. They may also proceed with site preparation work including the excavation of foundations and placement of concrete forms, but not concrete or other permanent structure may be placed until a building permit is obtained.

Currently, the City is considering amending our Zoning Ordinance to reduce the level of review required for co-locations subsequent to the first establishment of the use, co-location in conjunction with other uses, and placement of wireless service sites in industrial areas.

4) (I. Definitional Issues, No. 6) The Commission also is seeking comment on whether relief should be granted from a final action or failure to act based only partially on concerns relating to RF emissions. We agree that state and local regulations do not have to be wholly based on environmental concerns relating to RF emissions in order to be eligible for review by the Commission. However, we assert that the party requesting relief should be required to show that RF emission concerns, even when evidence of compliance with FCC regulations was provided, formed a principal part of the regulation from which relief is sought. No relief should be granted when evidence of compliance, current or future, with relevant FCC standards has not been provided and made a part of the record of the decision. Otherwise collateral attacks on regulations, based on an assertion of a relationship to RF emissions, even when such relationships are indirect, unintended, and/or inconsequential, such as overall height limits in specific zoning districts or requirements for screening or camouflage of broadcast facilities, will be frequent and without merit.

In addition, we assert that administrative relief provided by the Commission should be strictly limited to those portions of a regulation where a direct and disallowed relationship is established between the regulation and environmental concerns relating to RF emissions.

Further, we assert that the position stated in item 7 of the summary of the proposed rulemaking, relating to the presence in the record of testimony from the public based on RF emissions, is not sound. Section 332 (c) (7)(B)(iii) requires written findings, supported by substantial evidence, when a decision to deny a request is made. If adequate evidence existed to deny the request, whether or not the issue of RF emissions was raised, the decision should stand as the emission issue was not the predominant basis of the decision.

5) (I. Definitional Issues, No. 8) In reference to the request for comment on whether a private homeowners association or other private party, or private agreement or covenant, qualifies as an instrumentality of the state or local government as defined in section 332 (c) (7)(B)(ii). We assert that in no way do private associations organized to administer or facilitate the enjoyment of private property take part in the class of organizations comprising state or local governments. They are private and wholly voluntary without requirement of membership to the general public.

Further, to allow the preemption of private property rights for the fiscal or other gain of discrete individuals or corporations would most definitely bestow a preferential treatment upon the wireless services industry which the Congress explicitly stated they did not intend to do.

6) (II. Demonstration of RF Compliance, No. 9-15) The second section of the summary of the notice of proposed rule making discusses the limitation on state or local governmental regulations by section 332 (c) (7)(B)(iv) of the Communications Act. Comment was requested

relating to what level of evidence a governmental body should be able to require of an applicant to demonstrate compliance with RF emission standards. We assert that the second, more substantive, showing described in item 11 is preferable. Further, that all four items of information described in item 13 of the summary of the notice of proposed rulemaking should be included in a demonstration of compliance.

As the applicants are claiming that they are exempt from certain types of regulation, to which they would otherwise be susceptible, due to compliance with FCC RF emission standards the burden of proof should rest with them. As the majority of the information is likely to be generally standard information available from the manufacturer of the equipment and readily applicable to multiple individual sites this level of demonstration should not be a burden to the service providers. Furthermore, this level of demonstration of compliance provides a portion of the record needed to protect applicants from claims by members of the public of noncompliance which would legally allow denial of applications under section 332 (c) (7)(B)(iv) of the Communications Act.

7) (V. Operation of Presumption, No. 20-22) The ability to rebut the presumption of compliance with RF emission guidelines is desirable. A clear procedure describing how evidence may be gathered and what standards of evidence are required would also be desirable. We argue that all persons, organizations, or entities residing or owning property with an area where emissions exceed the guidelines should qualify as an interested party and have standing to participate in proceedings.

8) (VI. Procedural Matters, No. 28) As stated above in section six of this letter we assert that the more detailed demonstration of compliance is appropriate as a standard of evidence for submission to state and local governments. We encourage you to adopt this standard as considered in the summary of the notice of the proposed rulemaking, item 28, Reporting, Recordkeeping, and Other Compliance Requirements. We do not believe that this level of evidence would be burdensome or otherwise problematic for service providers.

Respectfully,



Chris Saunders
Associate Planner

cc: Clark V. Johnson, City Manager
Paul Luwe, City Attorney
Ron Brey, Assistant City Manager
Andrew C. Eppler, Planning Director
file



**BOZEMAN CITY-COUNTY
PLANNING OFFICE**

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Bozeman, Montana 59715
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INFORMATIONAL GUIDE FOR:
CONDITIONAL USE PERMITS

This information is provided as a guide to assist you in the preparation of your application for a conditional use permit. It is also intended to explain the application process.

WHAT IS A CONDITIONAL USE PERMIT?

a conditional use permit (CUP) allows certain uses to be located in an area on a case by case basis after review by the Bozeman City-County Planning Board and City Commission. This review is required in order to ensure that the proposed use will not endanger public health and safety and that it will be appropriate in its proposed location.

WHEN IS A CONDITIONAL USE PERMIT REQUIRED?

A conditional use permit is required of all uses or development proposals listed as conditional in the Bozeman Area Zoning Ordinance.

WHAT INFORMATION IS REQUIRED?

APPLICATION FORM

Visit the City-County Planning Office to determine if what you are proposing will require a conditional

BOZEMAN CITY-COUNTY PLANNING OFFICE
P.O. Box 640
Bozeman, MT 59715

proposal and answer any of your questions. If a conditional use permit is required, you will be given the appropriate forms, advised of the materials and application fee that are needed and informed of the time period when the application will be processed.

A formal submittal for conditional use permit approval will, amongst other things, require the preparation of a site plan which indicates the location of existing and proposed improvements (i.e. structures, parking, landscaping, etc.) It is often beneficial to contact a professional design office to assist you with your submittal requirements. The Planning Office also recommends that you take part in an informal/pre-application meeting and review of conceptual plans with planning staff. This review can prove to be very helpful in the preparation of your proposal and can save you time and money.

WHAT IS THE APPLICATION PROCESS?

STAFF REVIEW

When your application is submitted to the Planning Office, it will be assigned to a staff planner. The staff planner will review your application for compliance with requirements of the Zoning Ordinance. Your application will also be routed to the Development Review Committee (DRC) and any other necessary agencies for their review.

DESIGN REVIEW BOARD (DRB)

If your project is located within the "Conservation Overlay" district or one of the City's "Entryway Corridors", it will also be reviewed for "Certificate of Appropriateness" approval by the Design Review Board (DRB). The Design Review Board is responsible for the evaluation of projects with regard to design features. For more information on design review, please consult the "Informational Guide for a Certificate of Appropriateness".

PUBLIC HEARINGS

A notice of public hearing will be sent to property owners within 200' of your site, posted at the site and published in the newspaper informing the public of the date, time and place of the public hearings before the City-County Planning Board and City Commission. The hearings give citizens a chance to comment on the proposed conditional use permit.

Planning Board

Once the development review committee (DRC) has reviewed your project for compliance with City codes, the project planner will prepare a report which incorporates the comments of each of the agencies involved in the review process. This report is then presented to the City-County Planning Board who is responsible for recommending approval or denial of the conditional use permit after considering the information in the staff report and any testimony given at the public hearing. This recommendation is then forwarded to the City Commission.

City Commission

The City Commission is the final decision making authority for conditional use permit applications. The Commission will consider the recommendation of the Planning Board, the information presented in the Planning Board staff report, and any testimony given at the public hearing(s). The Commission will then act upon your application or continue the item to their next meeting in order to reach a final decision. The conditional use permit process usually takes eight to twelve weeks from the time an application is filed until a decision is reached by the Commission.

PROJECT APPROVAL

If the City Commission approves your conditional use permit application, your approval becomes

effective subject to any required conditions. Within six months of approval, a final site plan which incorporates any required conditions must be submitted and approved by the Planning Office. A building permit (if necessary) must be obtained within one year of final site plan approval for your conditional use permit. You must also enter into an improvements agreement with the City to ensure project completion. Should you wish to occupy a new building prior to completion of your project, the improvements agreement must be secured by a method of security equal to one and one half times the amount of the scheduled improvements not yet installed. Thereafter, your project must be completed within nine months of occupancy.

IS THERE ANY ADDITIONAL INFORMATION I NEED TO KNOW?

SIGNAGE

If you request signage as a part of your conditional use permit application, the sign must conform to the standards of the Bozeman Area Sign Code.

BUILDING STANDARDS

If you are going to operate your conditional use in an existing building, you should check with the City's Building Department to determine if the use is appropriate in the structure or if modifications will need to be made in order to bring the building up to Uniform Building Code (UBC) standards.

CHAPTER 18.53 OF THE ZONING ORDINANCE

For a complete discussion of the conditional use permit process, see Chapter 18.53 of the Bozeman Area Zoning Ordinance.

PROCESS FLOWCHARTS - CONDITIONAL USE PERMIT APPLICATIONS

TYPE OF APPLICATION

WEEK 1*

WEEK 2

WEEK 3

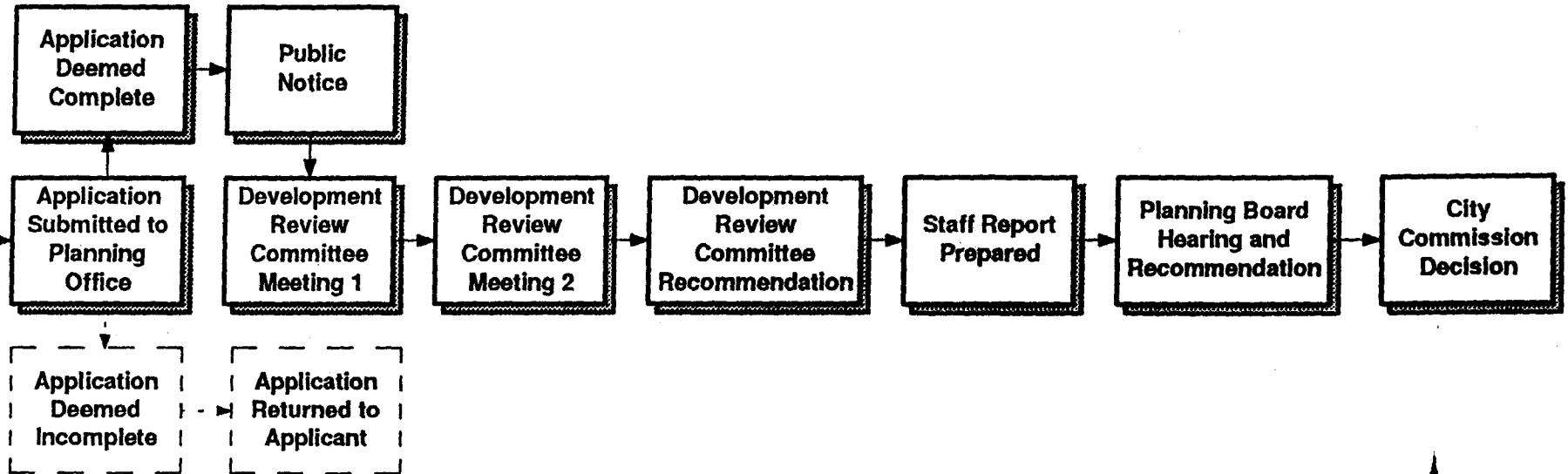
WEEK 4

WEEK 5-6

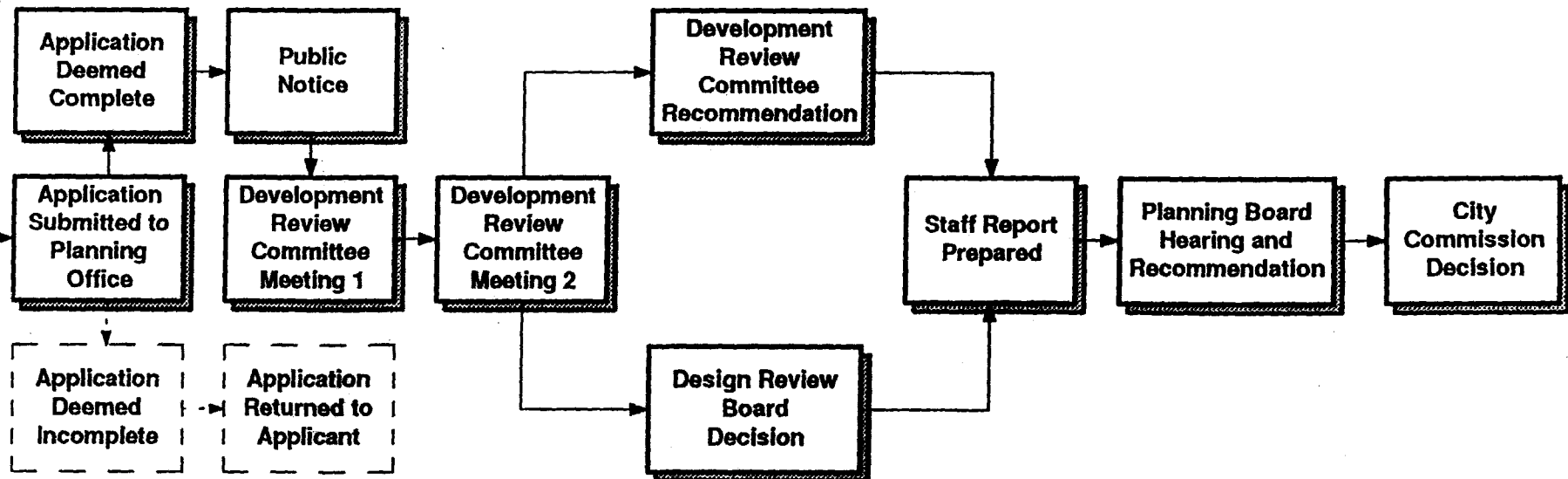
WEEK 7

WEEK 8

Conditional
Use Permit
Applications



Conditional
Use Permit
Applications
Within Overlay
District



*Timelines are approximate and subject to scheduling constraints.

Additional design assistance for rehabilitation of historic properties can be obtained from the Historic Preservation Commission. Effective 10.5.95